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Could Scotland Remain in Both the EU and the UK After 'Brexit'?

Author(s): Mark Lazarowicz

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One of the challenges facing Scotland following the EU referendum is whether it could retain membership of the EU while continuing to be part of the UK, writes Mark Lazarowicz. He considers several options in detail and suggests that, while they might be possible, all would require a substantial degree of political will, both within the UK and from the remaining EU members.

The strong support shown by voters in Scotland for EU membership has inevitably led to an examination of possible constitutional arrangements by which Scotland could remain in *both* the EU and the UK after Brexit. What are these options, and are they feasible?

The 'Greenland Option'

One proposal is the 'Greenland option'. Greenland is a part of the Kingdom of Denmark, which is a member of the EU. However, Greenland is not a part of the EU, which it left in 1985.

So, if it is possible for part of Denmark to be in the EU, and part of it to be outside, why can't part of the UK (Scotland – and maybe Northern Ireland or even London) remain in the EU, whilst Wales and (most of) England, leave the EU? It's an intriguing idea. However, a closer examination of that option immediately reveals a whole range of problems.

In the case of Denmark and Greenland, Denmark has remained a Member State of the EU. Greenland is for almost all internal affairs a self-governing country, with Danish responsibility limited essentially to foreign affairs, monetary policy, citizenship and defence.

By contrast, in the case of Scotland and the UK, it is the UK which is the Member State of the EU. The application of the Greenland option would logically mean that the UK remains a member of the EU, but EU decisions and legislation would only apply to the 10–20 per cent of the UK which remained in the EU.

Leaving aside the fact that such an arrangement would mean that the UK as a whole would still, at least nominally, remain part of the EU, it is easy to see the practical difficulties. Every EU decision and every piece of EU legislation would have

an opt-out so that it didn't apply to the rest of UK, but just applied to those parts of the UK remaining in the EU.

It would also logically mean that UK government Ministers would be sitting in EU institutions deciding on EU legislation which would not apply to 80-90 per cent of the UK. There would be a UK European Commissioner who would be taking part in decisions which only applied to a small part of the state which had sent her or him there.

Furthermore, as EU law would still apply in Scotland, the UK Parliament could no longer pass laws for the whole of the UK which conflicted with EU law, and in a whole range of areas would have to pass separate legislation for Scotland which was consistent with EU law, if it was dealing with areas which hadn't been devolved to Scotland.

It has been suggested that one way round these difficulties would be for the Scottish Government to take over UK government functions in the EU, including the nomination of Commissioners, and that MEPs from the rest of the UK cease to serve in the European Parliament, whilst MEPs from Scotland (and any other bits of the UK that wished to remain in the EU) would stay.

In effect, however, this would mean that Scotland was in reality the Member State of the EU, not the UK, and would be an independent state in the EU in all but name. It is hard to see how that fiction would be acceptable to the UK as the nominal Member State.

It is also hard to believe that the rest of the EU would accept an arrangement where the UK acts as if it were a full member of the EU, when in reality 80-90 per cent of the UK wasn't in the EU. This is in stark contrast to the case of Denmark, where 98 per cent of its population is within the EU, and only 2 per cent – in Greenland and the Faroe Islands – outside).

There is an even more fundamental difficulty with the Greenland option. For as long as the UK remained as the ultimate sovereign authority for all its constituent parts, Scotland and any other 'European' parts of the UK, could never guarantee that they would be able to implement European decisions and legislation in their own area, even if they wished to do so.

The possibility would always exist that, if a European measure which Scotland wished to implement conflicted with what the UK considered as in the best interests of the UK as a whole, the UK Parliament could stop that measure being implemented. Similarly, if the UK Parliament or Government decided to implement measures throughout the UK, the parliaments or assemblies of those parts would not be able to prevent that happening, even if it conflicted with EU legislation and decisions.

In effect, the Greenland option would mean that part of the EU was not a sovereign state, but one where the ultimate power lay with a state which was not part of the EU. It is hard to see how such an arrangement would be acceptable to the rest of the EU, even if it was acceptable to the rest of the UK (which is questionable).

Transfer of Certain Sovereign Powers to Scotland

One way round these difficulties would be for the UK to agree an irrevocable transfer of its sovereign legislative powers to Scotland (and any other interested parts of the UK) over all matters that have a potential EU dimension, or alternatively a general and irrevocable transfer of sovereign legislative competence in all matters where the EU had chosen in the past, or chooses in the future, to legislate.

The key concepts here are ‘irrevocable’ and ‘sovereign’. That means that these powers are devolved permanently and without any ability by the UK Parliament to reverse that transfer, or to overrule any decisions or legislation made by the Scottish Parliament using the powers transferred to it.

Given that EU legislation can potentially affect very many areas of policy and legislation, the scope of such a transfer would need to be extremely extensive. It would mean the transfer of powers even in areas where the EU does not have competence, because otherwise government activity in Scotland would become too fragmented.

In practice, it would mean that Scotland (and any other parts of the UK to which a similar transfer is made) would need to become a sovereign state in practically all areas of government activity except defence, some justice and home affairs matters, some foreign affairs matters, monetary policy and the monarchy. It would be a transfer of powers even in excess of that envisaged by advocates of devo-max.

To allow Scotland (and any other parts of the UK) to remain in the EU, an essential element of that transfer of sovereign power would need to be the transfer to Scotland (and any other parts of the UK) of the UK’s rights and obligations under the EU treaties.

That would include the right to participate in the relevant EU institutions, although clearly changes would be required to reflect the smaller budget and population of those parts of the UK that chose to remain. There are also issues as to how such participation would be structured if more than one part of the UK wished to go down this road along with Scotland.

Such a transfer of the UK’s rights and obligations means that Scotland (and other UK areas) should not need to apply to the EU as a new Member State. Any changes required could perhaps be undertaken using the *passerelle* provisions of the treaties.

It might even be possible for such a transfer to be accepted as valid by the EU by means of a Decision of the European Council. If the political will was there in the other EU Member States, there is a reasonable possibility that these changes could be brought about without requiring EU treaty change.

Some might say that, with such an extensive transfer of sovereign powers, there would be no reason not to go the full way down the road to independence. It could

be argued that independence would be simpler, and that the arrangement proposed might not be regarded by the EU states as acceptable anyway.

On the other hand, a transfer of sovereignty arrangement does allow continued membership of the EU for Scotland and any other relevant parts of the UK, while at the same time retaining significant links with the UK. That might make it an arrangement which would make it more acceptable to those in Scotland who do not support independence, and indeed the rest of the UK as well.

It might also be an arrangement acceptable to those other Member States of the EU who would be nervous about encouraging independence movements in their own states. A transfer of sovereign powers to Scotland and perhaps other parts of the UK, which still maintained the existence of a UK, might be accepted as being of a similar nature to the Greenland–Denmark arrangement.

An arrangement based on the transfer of sovereign powers in this way would be complex to establish, but could probably work if the political will was there. It does have the advantage that it would not require constitutional rearrangements in those parts of the UK which do want to leave the UK, and where there is no demand for greater autonomy.

Of course, traditional constitutional theory suggests that the sovereignty of the UK Parliament means that there can be no irrevocable transfer of sovereign power of this nature, but various steps could be taken to ‘entrench’ the legislation.

Federalism

The next set of options to allow Scotland, and other areas, to join the UK whilst the rest leaves do have the disadvantage that has just been described – namely, that they would require constitutional change in parts of the UK that do not appear to want it. These are the options of ‘federalism’ and ‘confederalism’. These options do, however, have the advantage of being clearer and less complex, and also in that they could address longer standing problems with the governmental structure of the UK.

Under the ‘federal’ option, Scotland could remain in the EU by the UK becoming a federal state, where the four constituent nations can decide whether or not to remain parts of the EU. However, the same need for each of those nations to be able to exercise sovereign power over all potential EU legislation and decisions, if they wish to remain in the EU, still applies, with both the advantages and disadvantages which are described above.

It has also been suggested that a federal state might allow some nations of the UK to have an ‘associative arrangement’ with the EU. It is not entirely clear what that means. However, if it doesn’t mean full membership, it does not seem to have any advantages over ‘European Economic Area (EEA)’ style membership for the UK as a whole, which is obviously the clear preference of most ‘Remain’ politicians in the current UK government, and most of the Tory ‘Leave’ leaders as well.

A New UK Union

If the solution is to be found in turning the UK into a federal state, where some nations have sufficiently extensive sovereign powers to allow them to remain in the EU whilst still being in the UK, there is surely a strong argument for going further, and transforming the UK into a fully-fledged confederal union.

That would be an arrangement where all its constituent parts are in principle sovereign in all matters, but where they decide to transfer sovereignty over certain matters to a common UK union. That means that some parts of the UK could agree that the common UK union would not be part of the EU, and would exercise all the powers which are currently transferred to the EU and which would be returned after Brexit.

Others could allow the existing pooling of competences within the EU to continue for their part of the UK, and to have transferred to those parts the UK's current rights and responsibilities under the EU treaties, and therefore to remain as full members of the EU.

There is a model for this type of arrangement – the European Union itself. Now, there would also be a UK Union, some members of which could decide to transfer certain of their sovereign powers to the EU and act collectively with other EU members in those areas of responsibility. In other areas of government activity, the various nations of the UK could decide that these could be exercised on their behalf by the UK Union, for example monetary policy and defence matters.

Such a UK Union would inevitably mean that the current UK Parliament would need to become the English Parliament (as it is increasingly now anyway), and a new Union assembly of some sort established.

However, far from resulting in the establishment of additional political institutions and the extra costs entailed, these changes would present the ideal opportunity for abolition of the House of Lords – there is no reason why England could not operate its internal affairs with a single parliamentary chamber, just as happens in Scotland, Wales and Northern Ireland.

Moving towards a fully confederal UK might seem a step too far – but given the self-evident breakdown not just of a common British political culture, but also the rapid decline in popular identification with the whole concept of 'Britain', perhaps now is the time to re-establish the relationships between the different nations of the UK on a new and more stable footing.

And given the speed with which politics in the UK is moving at the moment, reforms which today might seem to be far-fetched might tomorrow prove to be desirable and widely accepted.

Both the 'federal' and 'confederal' options do have the serious, potentially fatal, drawback that, because they have wider consequences than just for UK-EU relationships, they might take many years to be developed and obtain sufficient support across the whole UK, if ever – and certainly well beyond the patience limits of other EU Member States.

Constitutional Outlook

In this article, I have outlined a number of possible constitutional arrangements which would allow Scotland to remain both in the EU and in the UK, even if the UK as a whole does eventually leave the EU. All these are arrangements of some complexity, and present considerable practical, political and legal difficulties.

Considerable goodwill on the part of the rest of the UK, and the EU, would be required if there was to be any prospect of any of them being put into effect. All such arrangements would require Scotland (and any other parts of the UK with a similar interest) to be devolved sovereign powers, on an irrevocable basis, over extensive areas of government activity.

The option of transforming the UK into a fully confederal union might be the most stable in the long run, and it also addresses some of the wider political questions facing the UK, but may not be acceptable to other parts of the UK.

The only way, of course, to guarantee that Scotland can remain in both the EU and the UK is for Brexit not to go ahead. If Brexit does become inevitable, then the various constitutional options outlined in this article offer possible ways in which Scotland could remain both in the EU *and* in the UK after Brexit.

If they prove to be unacceptable to either or both of the EU or the rest of the UK, the only way for Scotland to retain membership of the EU would be for it to do so as a fully independent state.

Author information:

Mark Lazarowicz

Mark Lazarowicz is an advocate, with experience in reparation, administrative law, housing, immigration and other fields of public law. He was Labour MP for Edinburgh North and Leith between 2001 and 2015, focusing on environmental, energy, climate change, financial services and constitutional issues.

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